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Gender Equality in the Courts: Women's Work Is Never Done

Cover Page Footnote

Associate Justice, Utah Supreme Court.

GENDER EQUALITY IN THE COURTS: WOMEN'S WORK IS NEVER DONE

CHRISTINE M. DURHAM*

Judge Kaye's conclusion that "*this* is the time [women in the legal profession] will make a real impact that might serve as a model for all society as it struggles toward gender equality"¹ echoes the comments of another jurist, Judge Patricia Wald, about the same subject several years ago:

The formidable achievements of women lawyers over the past generation have brought us a long way on the road to career equality and recognition. We are at an interesting way station in that trip, perhaps worth a pause to think about what women want to do in and for our chosen profession. There are enough of us now—and many more coming—to make a difference. The question is, quite simply, *what kind of difference*.²

Historical perspective on the question of gender equality suggests that it has always been a concern primarily of women, for women.³ Only secondarily has gender equality been a concern on the part of society for itself. That fact places burdens on women who are aware of living lives with significance not only for themselves, but also as role models and ground breakers for women in general. Some professional women perceive the demands for transcendence as a call to duty; others perceive it as an overwhelming and unfair sacrifice of personal energy and time. It should not be surprising then, that some women committed to the legal profession experience considerable ambivalence about the questions Judge Wald asks and the ideals Judge Kaye identifies. Deborah Rhode points out that, "[a]lthough the last decade has witnessed substantial improvement in the demographic and cultural landscape of the profession, the rhetoric of gender equality does not yet match the reality of women's experience."⁴ At the same time, few concerned about gender equality feel ambivalent about the goal of transformation. Nowhere is its urgency and overwhelming scope more apparent than in the courts of America. Judge Kaye asks what it means for women to participate in a system developed essentially without them.⁵ For women in the judiciary it

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1. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 *Fordham L. Rev.* 111, 126 (1988).

2. Wald, *Women in the Law: Stage Two*, 52 *UMKC L. Rev.* 45, 45 (1983) (emphasis added).

3. Judge Wald aptly stated this thought: "Why, after all, should we be any more idealistic about our profession than men? Perhaps it is enough to answer simply, 'because we are women.'" Wald, *supra* note 2, at 48.

4. Rhode, *The "Woman's Point of View"*, 38 *J. Legal Ed.* 39, 40 (Mar./June 1988). See *infra* note 8.

5. See Kaye, *supra* note 1, at 112.

means, among other things, a great deal of difficult, slow, frustrating work. The New York Task Force on Women in the Courts prefaced its 1986 report with the conclusion that "gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity."⁶ Task forces in more than a dozen states echo this conclusion.⁷ The findings in New York, New Jersey, and other states with published reports document serious inequities in the courts connected with domestic violence, criminal law, matrimonial disputes, economic rights, courtroom procedures and court administration.⁸ The responses required by the courts to correct such inequities are expensive, long-term, and labor-intensive. They include such devices as permanent standing committees within court systems, the development and use of integrated judicial education materials related to gender equality, the establishment of grievance procedures, and perhaps most importantly, the expansion of understanding about gender equality in legal education.⁹

It is significant, but of course not surprising, that the impetus for response and reform in the courts has arisen from the activism and interest of women lawyers, academics and judges, specifically the joint efforts of the National Association of Women Judges¹⁰ and the National Judicial Education Program to Promote Equality for Women and Men in the Courts ("NJEP").¹¹ The work of these organizations and their members has made gender bias a legitimate topic for judicial education and reform.¹²

The reason pioneer judges and lawyers, researchers, and teachers in this movement care about gender equality in the courts is probably, in

6. *Report of the New York Task Force on Women in the Courts*, 15 *Fordham Urban L.J.* 15, 15 (1986).

7. See Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 38 *J. Legal Ed.* 87, 87 n.2 (Mar./June 1988).

8. See Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 *Judicature* 280, 280-81 (Feb./Mar. 1987). Schafran cites three aspects of gender bias which are at the root of these inequities: "stereotyped thinking about the nature and roles of women and men, . . . society's perception of the relative worth of men and women and what is perceived as women's and men's work, and myths and misconceptions about the economic and social realities of women's and men's lives." *Id.*

According to the New York and New Jersey Task Force Reports, these biases manifest themselves in ugly ways. For example, battered wives and rape victims are often assumed to deserve the abuse and to "enjoy the pain." See *id.* at 283-84. Women going through divorces are generally given less support than they realistically need to live above the poverty level, and women are often denied reasonable counsel fees. See *id.* at 284-85.

9. See Schneider, *supra* note 7, at 87. Such devices have, in fact, been implemented in New Jersey since 1983, at the direction of Chief Justice Robert Wilentz. See Schafran, *supra* note 8, at 289. New York, at the direction of Chief Judge Sol Wachtler, began in 1987 to implement similar devices. See Schafran, *supra* note 8, at 290.

10. This program is funded by the Women Judges' Fund for Justice.

11. See Schafran, *supra* note 8, at 87.

12. See *id.* at 93-95. In 1988, for example, the Conference of Chief Justices passed a resolution encouraging the formation of task forces on gender and justice in all of the states.

Judge Wald's words, "because they are women." Because of these women, those concerned about the work of the courts, both men and women, have identified what needs to be done and are beginning to implement these changes. One feminist scholar, however, warns us that this effort for change should not be termed "'women's work' but as the work of all."¹³ She warns us:

[I]t would be unwise and unfair to delegate to women the responsibility for changing the legal profession. The law will become more responsive to all members of society only when those in power concede that it is the proper thing to do, and it will be accomplished only if the powerful are drawn from a broader pool than before—one that includes not only women but also men with ideals and talent. Furthermore, in the matter of simple justice, no one group ought to be burdened with the expectation of unilateral altruism. This position is usually both unappreciated and ineffective.¹⁴

This warning appears to be heeded as men in power have begun to enforce the necessary and long-awaited changes.¹⁵

Perhaps one hallmark of a mature professional mirrors that of a mature personality: the capacity to tolerate a high degree of ambiguity and ambivalence. If so, women lawyers and judges are maturing rapidly in their efforts to come to terms with gender equality and their role in realizing it, in the profession and in the courts. The process gives new and ironic content to the once-familiar domestic adage, "Women's work is never done."

13. C. Epstein, *Women in Law* 386 (1981).

14. *Id.* at 385-86.

15. *See supra* note 9 (two male judges in New York and New Jersey leading court reform).

